84-1319

No. 84-

Office-Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 15, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1110

RONALD L. COSBY, *et al*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

BURLINGTON NORTHERN RAILROAD COMPANY,
Intervenor.

On Petition for Review of Orders
of the Interstate Commerce Commission.

Submitted: June 15, 1984

Filed: August 22, 1984

Before HEANEY and FAGG, Circuit Judges, and COLLINSON,* Senior District Judge.

HEANEY, Circuit Judge.

Ronald L. Cosby and more than one hundred other terminated employees of the Frisco Transportation Com-

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* The Honorable WILLIAM R. COLLINSON, Senior United States District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

pany (FTC), a subsidiary of the St. Louis-San Francisco Railway Company (Frisco), requests this Court to review a decision of the Interstate Commerce Commission which denied them layoff benefits in accordance with employee protective conditions contained in a 1980 order approving the merger of the Burlington Northern (BN) and Frisco. 360 I.C.C. 788 (1980), *aff'd sub nom., Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). We hold that the petitioners are entitled to receive benefits in accordance with the protective conditions contained in the 1980 order. We remand to the Commission for a computation of benefits.

The reasons for our decision are as follows:

(1) *The FTC employees are entitled to protective conditions under 49 U.S.C. § 11347 (1984). That section requires the Commission "to provide a fair arrangement * * * protective of the interest of employees who are affected by the transaction * * *."*[1]

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[1] 49 U.S.C. § 11347 provides in its entirety:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of *employees who are affected by* the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangements and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period). Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1439. [Emphasis added.]

The history of protective provisions for employees of merging or consolidating rail carriers is recounted in *New York Dock Railway v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979). In 1933, Congress enacted the Emergency Railroad Transportation Act which mandated a job freeze to guarantee the continued employment of employees of consolidating railroads. Because of the extreme effect this approach could have on operational efficiency, railroads and labor organizations agreed to a job security arrangement that provided bargaining and compensation protection to employees, but allowed the railroads to reduce their work force. That agreement was the Washington Job Protection Agreement of 1936 (WJPA). In 1940, Congress amended the Interstate Commerce Act to include, *inter alia*, a labor protective provision modeled on the WJPA, 49 U.S.C. § 5(2)(f). That section was extensively revised in 1978 and recodified at 49 U.S.C. § 11347.

On its face, section 11347 applies to those who are (1) employees of one of the railroads participating in the merger,[2] and (2) affected by the transaction. There is no doubt that the FTC employees were affected, i.e., "touched significantly," by the BN-Frisco merger. *See Railway Labor Executives' Assoc. v. United States*, 216 F. Supp. 101, 102 (E.D. Va. 1963). After the merger, BN had two motor carriers operating under auxiliary-to-rail restrictions. Both companies serviced its rail business. After the deregulation of the carrier industries, BN had several options with respect to its motor carrier subsidiaries. It chose to expand the certificated authority of one of its motor carrier subsidiaries at the expense of the other. It expanded BN Transport's authority and FTC, still burdened by its traditional rail-related restric-

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[2] The provision generally does not cover employees of other railroads which might be affected by the merger. *Lamoille Valley Railroad v. Interstate Commerce Commission*, 711 F.2d 295, 323 (D.C. Cir. 1983); *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392, 412 (5th Cir. 1980).

tions, was unable to effectively compete. If FTC had not been made a subsidiary of BN as a result of the merger, BN could not have phased out FTC to make room for its other motor carrier subsidiary. Thus, FTC employees are clearly employees affected by the transaction.

They were also employees of Frisco, a participant in the merger. The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transactions under section 5 of the Act." *Pennsylvania Railroad Company-Merger-New York Central Railroad*, 347 I.C.C. 536, 546 (1974) (citing *Louisville & J.B. & R. Co. Merger*, 290 I.C.C. 725, 733; 295 I.C.C. 11; *Woods Industries, Inc.-Control-United Transports, Inc.*, 85 M.C.C. 672, 675). As the Commission noted in *Pennsylvania Railroad*, "the parent, by reason of ownership, has the legal right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result * * * in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence." *Id.* at 547. The Commission concluded in that case that the Act's mandatory protective provisions covered employees of rail carrier subsidiaries.

The Commission does not seem to contest the above conclusions, rather it contends that a third condition must be met before section 11347 is applicable—the employees of the railroad must also be railroad employees, that is, work for the railroad itself or a rail carrier subsidiary. Although section 11347 contains no such explicit condition, the Commission refers to the previous version of that provision, 49 U.S.C. § 5(2)(f). Section 5(2)(f) directed the Commission to "require a fair and equitable arrangement to protect the interests of the *railroad employees affected*." (Emphasis added.)[3] In

[3] 49 U.S.C. § 5(2) provides:

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad

Pennsylvania Railroad-Merger-New York Central Railroad, supra, 347 I.C.C. at 549, the Commission interpreted this phrase to mean that mandatory protective provisions did not extend to employees of non-rail subsidiaries. In the instant case, the Commission argues that because Congress only meant to clarify section 5(2)(f) by the rewording in section 11347 and not effect any substantive change, we should read the same restriction into the revised provision.

Congress amended section 5(2)(f) by substituting "employees who are affected by the transaction" for "railroad employees affected." We are hesitant to read into the revised provision the interpretation argued for by the Commission. If Congress meant for section 11347 to apply only to employees who worked for rail carriers and not all the employees affected by the merger, the clearest way to express this restriction would have been to leave the relevant language in section 5(2)(f) as it was.

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subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of *the railroad employees affected*. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 580; June 16, 1933, c. 91, Title II, §§ 201, 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905; Aug. 2, 1949, c. 379, § 3, 63 Stat. 485. [Emphasis added.]

We need not resolve this question of interpretation because we believe, in the circumstances of this case, that the FTC employees are "railroad employees" within the meaning of the Act. Supreme Court and Commission decisions have traditionally limited a railroad's authority to operate motor carrier companies to auxiliary-to-rail services unless special circumstances warranted expanded authority. *See American Trucking Associations v. United States*, 364 U.S. 1, 6 (1980); *American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243, 1244-1247 (5th Cir. 1984) (history of the auxiliary-to-rail restriction); *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91 (1954). The Commission determined both in the Merger Order and the Reopening Order that FTC's operations were generally restricted to service which was auxiliary to or supplemental of the Frisco rail service. FTC can thus be viewed as a part of Frisco's and, after the merger BN's, single transportation system. FTC was intimately tied to the railroad's main transportation function, in contrast to subsidiaries which are non-transportation oriented such as warehouse and mining enterprises. FTC employees should therefore be considered railroad employees.

The Commission objects to this line of reasoning, pointing out that employees of merging motor carrier companies are treated differently under the Act than employees of railway companies. Section 11344 (b) of the revised Act covers motor carrier mergers. It requires the Commission to "consider the interest of carrier employees affected by the transaction." 49 U.S.C. § 11344(b) (1984). Courts have recognized that the Commission has more discretion under this section in fashioning protective conditions for affected employees than it has under section 11347. *See Walters v. Roadway Express, Inc.*, 557 F.2d 521, 523 n.2 (5th Cir. 1977); *American Buslines, Inc. v. United States*, 253 F. Supp. 481, 483 (D. D.C. 1966); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v.*

United States, 221 F. Supp. 958 (D. D.C. 1963) (applying statutory predecessors 49 U.S.C. §§ 5(2)(c) and 5(2)(f). The rationale for this distinction is that motor carrier employees do not need as much protection because their skills are more transferable than those of railway employees. *American Buslines, Inc. v. United States*, *supra*, 253 F. Supp. at 483.

The Commission cites these cases to support the proposition that section 11347 and its predecessor section 5(2)(f) have been consistently interpreted to exclude motor carrier employees. While we realize the Commission's interpretation should be given great weight, *e.g.*, *Perkins v. Matthews*, 400 U.S. 379 (1971), we think the Commission is clearly wrong. None of the cited cases involve motor carrier subsidiaries of railroads which exclusively operate auxiliary-to-rail services. The transactions in those cases were between motor carriers and were thus clearly covered by section 11344(b).[4] Here, however, the transaction is a merger between two railroads and the motor carrier in question is a part of one of the merging railroad's overall transportation system. Moreover, there is no evidence in the record that the skills of FTC's employees were transferable to general motor carrier services. Under the facts and circumstances of this case, we think section 11347 governs protective conditions for FTC employees.

(2) *Even if it is assumed that the Commission has discretion to grant or deny protective conditions to employees of motor carriers operating at the time of merger as FTC did here, under the facts and circumstances of*

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[4] *Walters v. Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977), involved the merger of two motor carrier companies. *American Buslines, Inc. v. United States*, 253 F. Supp. 481, 483 (D. D.C. 1966), consolidated three cases, involving the purchases of busline and motor carrier companies by other such companies. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. United States*, 221 F. Supp. 958 (D. D.C. 1963), involved the purchase of one busline by another.

this case, it was an abuse of discretion not to grant the FTC employees the same protective conditions granted to Frisco's other railroad employees.

In the BN-Frisco merger proceedings, officials of the BN and the Frisco stated that only a few employees of either company would be adversely affected by the merger and that those that were affected would be protected by standard employees protective conditions. The assurances were not limited to employees of the parent companies, BN and Frisco, nor were employees of the FTC told that they would not be protected. Thus no employee of the FTC had reason to seek to intervene in the merger proceeding or to request his union to do so. Moreover, specific assurances were given that there would be no change in the operation or services to be provided by the FTC.

Louis W. Menk, Chairman of the Board and Chief Executive Officer of BN, filed a vertified statement with the Commission as a part of the merger application. He stated:

> The public interest also involves the potential impact on the employees of the two companies. Overall, because of the higher traffic volumes, it is expected that there will be a slight increase in employment over that of the two roads in 1976. * * * *I would like to emphasize* that, because of labor protective conditions, *no employee will face involuntary unemployment as a direct result of this merger without ample financial protection.*

(Verified Statement of L. W. Menk, pp. 11-12 (emphasis added).

R. C. Grayson, Chairman, Chief Executive Officer and President of Frisco, also filed a verified statement with the Commission as part of the merger application. He stated:

The increases in traffic after 3 years will result in a slight increase in employment because of increased needs, especially in the states served by Frisco. * * *

* * * *

This end-to-end merger should not result, or in itself, decrease the number of competitors anywhere. Single line service will provide financial strength and should enhance competition and aid the industry in its competitive struggle with motor carriers, water carriers, and pipelines. The effect on employment will be minimal with some reductions and transfers, primarily in the headquarters and other staff functions. Because of the end-to-end merger, reductions generally will occur through attrition and increases in employment will primarily be in the operating area necessitated by increased traffic volume. *In fact, by three years after merger, the number of jobs on the combined system will have actually increased.*

Verified Statement of R. C. Grayson, pp. 8 & 20 (emphasis added).

Additional verified statements relating to employee protection were filed by the following:

M. M. Donahue, Vice President of BN:

The proposed merger will improve the quality and efficiency of rail service offered to our shippers, *produce no long-term adverse impact on our employees,* increase the rate of utilization and productivity of our human and physical assets, and will increase the financial strength of the consolidated company to a level exceeding that achievable by the two companies standing alone. *The beneficiaries will include* * * * *the railroad industry, and the merged company's employees* and owners.

The estimated financial benefits to the merged company will total $32.5 million in the third year of

operation. * * * Of course, these benefits will be diminished during the early years of merged operation when payments will be made to offset the adverse impacts *on our employees.*

* * * *

In any merger, there is some reduction in the work force of the predecessor companies. In the conduct of our merger studies, we were careful to identify potential adverse impacts on our employees. We then undertook an analysis of the protective payments and such related costs as those associated with employee transfers. Based on our analyses, it is estimated that the employee protective payments will total $16.0 million during the first year of merged operation, $7.8 million the second year, and $4.6 million the third year (in 1976 dollars).

Verified Statement of M. M. Donahue, pp. 3 & 12 (emphasis added).

C. M. Illg, Assistant Vice President-Labor Relations of BN:

The proposed merger of BN and Frisco is entirely end-to-end in nature with only two common points (St. Louis and Kansas City). The primary purpose of the merger is to improve the quality and efficiency of the rail services offered to our shippers, rather than elimination of duplicate routes and redundant facilities. Therefore, *while any merger of two companies requires some realignment of forces, this transaction is not intended to result in substantial permanent reductions in employment.* * * *

With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacanices caused by employees leaving service in the normal course of events, and by the demands of in-

creased traffic. Even at Springfield, where it is contemplated that a net surplus of clerical employees will result, the anticipated increased business indicates that opportunities will exist for retraining most of these surplus clerical employees for new careers in other crafts.

Those employees who do become surplus, or are displaced or are transferred due to the transaction, will be covered by protective benefits. * * * Since it is not practicable to pursue the kind of negotiations necessary to reach protective agreements with the employee representatives prior to submitting this application, and the ultimate success of any such negotiations depends upon the ability of many parties to reach mutually satisfactory arrangements, appropriate conditions to protect the interest of the employees to be imposed by the Commission must be considered. In light of the relatively limited impact that the proposed transaction will have on the employees, they will be adequately protected by the protective conditions provided for in Section 5(2)(f) of the Interstate Commerce Act, and the cost of protective benefits shown in Table B of Exhibit 10(iii), (iv) and (v) for employees represented by unions adversely affected by this transaction has been based on the assumed imposition by the Commission of those conditions.

Verified Statement of C. M. Illg, pp. 4-6 (emphasis added).

At the time the application for merger of the BN and Frisco was submitted, a supplement to that application was also submitted. In describing that supplement, the BN stated:

At the request of the Commission, we are filing herewith a supplement to the above-captioned application. The purpose of the supplement is to pro-

> vide data called for in Commission Form OP-F-45 concerning the Frisco Transportation Company, a wholly owned motor carrier subsidiary of the St. Louis-San Francisco Railway Company. This supplementary information is being provided since, if the rail merger sought in the above-captioned application is approved and consummated, Burlington Northern, Inc. would then also acquire control of Frisco Transportation Company.

Burlington Northern Letter to Mr. Marvin Bober, Assistant Deputy Director, Interstate Commerce Commission, dated January 13, 1978.

The supplement stated:

> With respect to all information required as Appendix D, see the Joint Application generally Section 1111.1(a) through (e) and exhibits. With respect specifically to Appendix D-7, *no changes are proposed in the operation of FTC.* No control will be obtained unless the rail merger proposed in the Joint Application is approved and consummated. Should that occur, *FTC operations will continue in the same manner as at present and will bear the same relationship to Frisco rail operations as they do now.* Thus BN as successor to Frisco will be enabled to use service by motor vehicle to public advantage in its operations to the same extent and in the same manner as Frisco does today. Neither will there be any change in the competitive relationships with respect to other motor carriers nor will competition be unduly restrained. *If any consolidation with BN's motor carrier subsidiary is proposed in the future, a separate application will be filed with the Commission at that time.*

Supplement to Application, Finance Docket No. 28583 Sub No. 1, dated January 13, 1978, pp. 1, 6-7 (emphasis added).

No studies were made by the BN or its transportation company as to the effect of the acquisition of the control of the FTC by the BN. In response to questions, an officer of the BN Transportation Company stated:

> Q [Questioning of Mr. Thomas.] * * * The witnesses for the railroad have testified to various [studies], effects of the merger between BN and Frisco. Were any studies made by you or your transportation company as to the effect of the acquisition of the control of the Frisco Transportation Company by the BN?
>
> A Not to my knowledge, no, sir.
>
> Q You have no knowledge of how that acquisition will affect your operation?
>
> A I know to this extent, that we are not engaged in any merger. It would be merely a change in ownership and therefore, we had no merger study per as with BN Transportation or BN, Inc., or anybody else.
>
> Q You assume, do you, that your operations will be conducted in the future as they are in the present?
>
> A Absolutely.
>
> * * * *
>
> Mr. Olsen. Your Honor, I would like to point out that all the material in the supplementary application which pertains to acquisition of control of Frisco Transportation Company, all of the material in this application with respect to Burlington Northern is taken out of the rail merger application or out of our R-1 reports to the Commission. *There is nothing in there beyond that other than the simple policy statement that no change will be made in the operation of Frisco Transportation.*

Tr. 3453-3459 (emphasis added).

In the light of these facts, we cannot agree with the Commission that the petitioners waived their right to receive

the benefits of the protective condition by not intervening. They had a right to rely on the representations that were made by the officers of BN and Frisco. Moreover, the petitioners offered to provide evidence of additional personal reassurances from Frisco officials that their jobs would be safe, but the Commission declined to receive this evidence. It can hardly be heard now to say that they waived their rights by not taking an active role in merger proceedings.

SUMMARY

In our view, the FTC employees are entitled to the benefit of the protective conditions heretofore made available to the employees of the BN and the Frisco because they are employees who were affected by the merger within the meaning of the Act; and, alternatively, because it was an abuse of discretion on the part of the Commission to deny them benefits in light of the representations made by the railroads at the time of the merger.

Reversed and remanded.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: November 21, 1983

Service Date: November 29, 1983

In this and related proceedings, the Commission authorized the merger of the St. Louis-San Francisco Railway Company (Frisco) into Burlington Northern, Inc. (BN), subject to certain conditions.[1] Among the conditions imposed was a provision providing railroad employees of the merged system and subsidiaries, who had not negotiated separate employee protection agreements, with the level of protection authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).

Prior to the merger, Frisco Transportation Company (FTC) was a wholly-owned motor carrier subsidiary of Frisco, employing 162 people. Its operations were generally restricted to service which was auxiliary to, or supplemental of, Frisco rail service. Between the date of the merger (November 21, 1980) and the end of 1982, approximately 155 of the 162 FTC employees were terminated. The remaining 7 employees were transferred to other positions in the BN system. None of the terminated employees was afforded the benefits of the *New York Dock* employee protective conditions.

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[1] *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 784 (1980), *aff'd sub nom. Missouri-Kansas-Texas R. Co.* v. *United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied* 451 U.S. 1017 (1981).

By petition filed January 3, 1983, as supplemented February 23, 1983, and amended March 31, 1983, 112 former employees of FTC seek reopening of this proceeding pursuant to 49 U.S.C. 10327(g)(1) and 49 C.F.R. 1115.4 on the basis of new evidence, substantially changed circumstances, material error, and incomplete disclosure of facts in the original proceeding.

Petitioners note that the merger applicants contended "that any adverse impact on employees will be short term only and confined to relatively few locations. Because of labor protective conditions which are required by statute, no employee would face involuntary unemployment as a direct result of the merger without ample financial protection." 360 I.C.C. 823. They further note the opinion expressed by the Commission that the effect of the merger transaction upon FTC would be "merely a change in form, not substance" resulting from the change in its corporate parent from Frisco to BN. 360 I.C.C. 959.

Petitioners allege that the lay-off and termination of virtually all of the FTC employees was by prior design of BN management but was not disclosed to the Commission. In support of this contention, petitioners set forth a series of facts and alleged actions by BN linking the termination of their employment to the merger transaction. They request that the Commission enforce, for their benefit, the employee protective conditions imposed in the merger decision and urge reopening for this purpose.

BN replies that the lay-offs were not a "direct result" of the merger, but were caused by events subsequent and unrelated to the merger. The principal event was the acquisition in 1981 by BN's other motor carrier subsidiary, BN Transport, of expanded authority giving it *unrestricted* general commodity authority in 48 states. This new authority overlapped FTC's authority. FTC was, in addition, burdened with the traditional restriction that its service be limited to transportation which is auxiliary or supplementary to rail service. Furthermore, BN

Transport's 1981 financial results showed a great improvement over 1980, while FTC went from a 1980 profit to a substantial loss in 1981. Accordingly, BN revised its pre-merger plan to retain FTC essentially unchanged and elected to close down its less profitable motor carrier.

BN also contends that the labor protective conditions imposed by the Commission were limited to railroad employees and that the petitioning motor carrier employees are beyond the scope of the Commission's order. Finally, BN argues that petitioners should not be allowed to now raise an issue they could have raised during the merger proceedings, including the public hearings from May 1978 to June 1979. Numerous other employee interests did appear to protect their interests.

Under 49 U.S.C. § 11347 the Commission is required to impose labor protection conditions *only* on the merging railroads, not motor carriers or other entities that might be involved. *See Walters* v. *Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977). While this requirement applies to rail carrier subsidiaries of the merging carriers, it does not apply to non-rail subsidiaries. *See Pennsylvania Railroad—Merger—New York Central Railroad*, 347 I.C.C. 536, 549-51 (1974).

On the other hand, the Commission does have the discretion under 49 U.S.C. § 11344(c) to impose labor protection conditions for the benefit of non-rail employees. In the BN-Frisco merger, however, petitioners did not request such protection and we did not exercise our discretion to impose it. By its own terms Condition 6 of the Commission's order approving the merger applies only to "railroad employees." *See Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway*, 360 I.C.C. 788, 1182 (1980).

As we have indicated, petitioners seek a reopening of the merger to enforce conditions. But the conditions we imposed, *New York Dock*, are not applicable to petitioners. Furthermore, we refrained from exercising our dis-

cretionary power to impose conditions to protect these non-railroad employees. Accordingly, there are no protective conditions for their benefit which we can enforce.[2] Under such circumstances, reopening would be a meaningless gesture.

This analysis does not end the matter, however, because we may interpret the petition as also seeking to invoke our power to issue supplemental orders under former Section 5(9) of the Interstate Commerce Act, which became Section 5(10) in 1976. That section provided:

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order under paragraphs (1), (2), and (8) [authorizing the Commission to approve mergers and certain other transactions] as it may deem necessary or appropriate.[3]

We stated in *Norfolk & W. Ry. and New York, Chi. & St. L. R.R.—Merger*, 363 I.C.C. 270, 280 (1980) that, in the absence of substantial error, our power to issue supplemental orders pursuant to this provision "is limited to cases where a party has failed to comply with an express condition imposed by the Commission, or a representation made by the party, or when compliance is no longer in the public interest."

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[2] It is questionable whether we have any authority to impose a condition after consummation of a merger, absent a specific reservation of jurisdiction. See *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). *Cf. Baltimore & O. R.R.* v. *United States*, 386 U.S. 372 (1967).

[3] As the Commission indicated in *Norfolk & W. Ry. and New York, Chi. & St. L. R.R. Merger*, 363 I.C.C. 270, 280 (1980), the 1978 codification of the Act omitted this section "as unnecessary in view of the restatement of the general investigatory and enforcement power of the Commission [in 49 U.S.C. 11701]." The N&W case recognized that this power remains with the Commission, since the codification may not be construed as effecting a substantive change. 363 I.C.C. at 280. See Note preceding 49 U.S.C. 10101.

As we have indicated above, there was no condition imposed in the merger for the benefit of petitioners. The only remaining question therefore concerns representations by BN. We have thoroughly reviewed the contentions of petitioners set forth in their pleadings, including the extensive "Petition to Amend Previous Petition to Reopen" filed after BN's Reply.[4] We are unable to conclude that petitioners have demonstrated there was any misrepresentation on the part of BN during the merger proceeding that led us to refrain from imposing conditions for petitioners' protection. We accept, and are satisfied with, BN's representations that the lay-offs experienced by petitioners were not contemplated by BN at the time of the merger, but resulted from changed business circumstances.

In particular, all of the "new" material advanced by petitioners in their "Petition to Amend" (except one assertion, which we will discuss), even when viewed in the light most favorable to petitioners, at most illustrates steps taken by BN *after* the merger. None of that evidence, even if accepted as true, shows that BN misrepresented its intention *before* the merger. The only portion of the "Petition to Amend" bearing on the issue of misrepresentation is the allegation that FTC employees were advised on several occasions that their jobs would be protected as a result of the merger. This allegation is entirely unsupported, however, and contains no detail on the form the alleged representations took. We can not credit these assertions, and find no basis for concluding that BN misled petitioners or the Commission.

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[4] BN moves to strike this pleading as a reply to a reply prohibited by 49 C.F.R. 1104.13(c) of the Commission's Rules of Practice. While our rules do not permit replies to replies, it would serve no purpose to reject the pleading here as petitioners could merely file it again as another petition to reopen. Moreover, in view of our disposition of the issue, BN will not be prejudiced.

Accordingly, there was no failure to disclose on BN's part which would amount to the "good cause" necessary for us to now issue a supplemental order.

In addition, petitioners have failed to give any satisfactory explanation for their failure to seek protective conditions during the merger proceedings. We have found that BN did not mislead in its merger application, and numerous employee organizations appeared in this extended and widely-publicized proceeding to protect their interests. *See* 360 I.C.C. 840-41. Petitioners could easily have participated.

Finally, we call to mind the principle reiterated recently in *Mobil Oil Corp.* v. *ICC*, 685 F.2d 624, 631 (D.C. Cir. 1982):

> "Both the Supreme Court and this Court consistently have subscribed to the rule that administrative agencies are not to be required to reopen their final orders 'except in the most extraordinary circumstances'" (footnote omitted). The rationale underlying this rule was articulated by the Supreme Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-15 (1946): "[I]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process would ever be consummated in an order that would not be subject to reopening."

This decision will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petition to reopen is denied.

2. BN's motion to strike is denied.

3. This decision is effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

JAMES H. BAYNE
Acting Secretary

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

vs.

ICC & U.S.A.
Respondents.

Petition for Review of Order of
Interstate Commerce Commission

JUDGMENT

This cause came to be submitted on the record from the Interstate Commerce Commission and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the Interstate Commerce Commission, is hereby, reversed and remanded to the commission with directions consistent with the opinion of this court.

August 22, 1984

Costs of petitioners for briefs for
recovery from respondents: $126.75

[Filed August 22, 1984
Robert D. St. Vrain, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,
AND UNITED STATES OF AMERICA,
Respondents.

BURLINGTON NORTHERN RAILROAD COMPANY,
Intervenor

Petition for Review of Order of
Interstate Commerce Commission

Intervenor Burlington Northern Railroad Company's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judge Bright did not participate in the consideration of the petition.

October 18, 1984

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28583 (Sub-No. 1)

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided: December 21, 1984

Service Date: January 8, 1985

Pursuant to the decision in *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), vacating the Commission's decision of November 21, 1983, and remanding the case, we are reopening this proceeding and imposing employee protective conditions at the level authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*) for the benefit of the former employees of the Frisco Transportation Company.

Counsel for the employees has suggested, in his letter of October 24, 1984, that the Commission assign the task of determining individual benefits to an administrative law judge. *New York Dock* encompasses the substantive benefits to which affected railroad employees are entitled and the procedures to be used in applying for these benefits. Binding arbitration is prescribed if the parties are unable to reach agreement on the application of any provision of the *New York Dock* conditions. 360 I.C.C. at 87-88. The arbitration panel, not the Commission, determines individual benefits. *See Walsh* v. *United States*, 723 F.2d 570 (7th Cir. 1983). Accordingly, we will not become involved in an area that should be resolved by the parties' negotiations or arbitration in accordance with the *New York Dock* conditions.

Petitioners' motion filed October 26, 1984, to add additional parties as petitioners will be dismissed as moot.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The proceeding is reopened.

2. The former employees of Frisco Transportation Company are granted the level of protection authorized in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

3. Petitioners' motion to additional parties as petitioners is dismissed.

4. This decision is effective on its date of service.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio.

JAMES H. BAYNE
Secretary

[SEAL]

STATUTES

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), provides:

> (c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), provides:

> (f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than

those imposed before February 5, 1976, pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may be entered into after September 18, 1940, by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 11344(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 11344(b)(2) (1982), provides:

> In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:
>
> (A) the effect of the proposed transaction on the adequacy of transportation to the public.
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
>
> (C) the total fixed charges that result from the proposed transaction.
>
> (D) the interest of carrier employees affected by the proposed transaction.

Section 11344(c) of the Interstate Commerce Act, 49 U.S.C. § 11344(c) (1982), provides:

> (c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and

authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347 (1982), provides:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

LABOR PROTECTIVE CONDITIONS

In *New York Dock Railway—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), the Commission set forth the following as the standard level of protection mandated by 49 U.S.C. § 11347 (1982):

> Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:
>
> 1. *Definitions.*—(a) "Transaction" means any action taken pursaunt to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.
>
> (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee

was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said

five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately

preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and con-

tinuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. *Separation allowance.*—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. *Fringe benefits.*—No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. *Moving expenses.*—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of the transaction, shall not be con-

sidered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes.*—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall

have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later

restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in

securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any

of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established un-

der 49 [illegible] 11347 before February 5, 1976 and under se[illegible] 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No. 84-1110

RONALD L. COSBY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

REQUESTED DESIGNATED PORTION OF RECORD BY APPELLANTS

1. Published notice of *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

2. Published notice of *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company—Control of Frisco Transportation Company*, Finance Docket No. MC-F-13500.

3. Original application of Burlington Northern, Inc. and St. Louis-San Francisco Railway Company in Finance Docket No. 28583, Sub-No. 1, and particularly pages 6, 7, 10, 54, 55, 62, 63, as well as attached verified statements as follows:

   a. Verified Statement of L.W. Menk, Chairman of BN;

   b. Verified Statement of R.C. Grayson, Chairman of the Board of Frisco;

c. Verified Statement of M.M. Donohue, Vice President BN;

d. Verified Statement of C.E. Able, Vice President, BN;

e. Verified Statement of C.M. Illg, Assistant Vice President, Labor Relations, BN; and

f. Verified Statement of M. Michael Smilin, Director—Employee Services, BN.

4. Letter from I.C.C. directing BN to file control application for Frisco Transportation Company (January, 1978).

5. Letter of Byron D. Olsen to Marvin Bober, Assistant Deputy Director, dated January 13, 1983, with pleading entitled "Supplement to Application", docketed as MC-F-13500 (copies of which are attached).

6. Oral hearing transcript, particularly pages:

a. 217—testimony of Mr. Menk (copies of which are attached);

b. 601 through 605—testimony of Jack D. Round (copies of which are attached);

c. 3330 through 3340—testimony of Mr. Illg (copies of 3330, 3331, 3332, 3333, 3334, 3336 and 3340 are attached);

d. 3453 through 3463—testimony of L.A. Thomas (copies of which are attached).

7. Hearing Exhibit 52 -Statement of L.A. Thomas.

8. Letter from Richard M. Bresler, President and Chief Executive Officer of Burlington Northern to Commissioner Thomas A. Trantham dated January 28, 1981.

9. I.C.C. Decision dated May 14, 1982 and served May 21, 1982 in *Burlington Northern, Inc.—Control and*

Merger—St. Louis-San Francisco Railway Company, Finance Docket No. 28583, Sub-No. 1; and *Great Northern Pacific and Burlington Lines, Inc.—Merger—Etc.—Great Northern Railway Company, et al.*, Finance Docket No. 21478.

10. I.C.C. Decision decided January 28, 1983 in *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

11. I.C.C. Decision decided March 25, 1980 and served April 17, 1980 in *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, Finance Docket No. 28583, Sub-No. 1.

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

Office of the Secretary

I, JAMES H. BAYNE, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Item No.	Item
1.	FEDERAL REGISTER NOTICE published 1/27/78
2.	FEDERAL REGISTER NOTICE published 1/27/78
3.	APPLICATION (pages 6, 7, 10, 54, 55, 62, 63 as specified) filed 12/28/77 and Verified Statements (a through f)
4.	LETTER from I.C.C. directing BN to file control application for Frisco Transportation Company (January, 1978) (copy cannot be located)
5.	LETTER of Byron D. Olsen to Marvin Bober, dated 1/13/83, with pleading entitled "Supplement to Application", docketed as MC-F-13500
6.	ORAL HEARING TRANSCRIPT (pages 217, 601 through 605, 3330 through 3340, and 3453 through 3463 as specified)
7.	HEARING EXHIBIT 52 (copy cannot be located)
8.	LETTER from Richard M. Bresler, to Commissioner Thomas A. Trantum dated 1/28/81 (copy cannot be located)
9.	DECISION, by Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham, Sterrett, Andre, and Simmons. Commissioner Simmons did not participate, served 5/21/83

PARTIES TO THE PROCEEDINGS BELOW

In addition to Ronald L. Cosby, named in the caption, the following individuals also appeared before the Interstate Commerce Commission and the Court of Appeals for the Eighth Circuit as petitioners:

J. T. Agee
W. Archer
D. L. Arnett
H. E. Arnold
W. R. Benda, Jr.
R. W. Bowman
J. H. Bosley
E. L. Brimmer
C. Bush
A. G. Calentine
D. P. Camdem
J. W. Campbell
L. L. Carroll
R. H. Chestnut
P. D. Clark
J. B. Clouse
D. L. Clymore
D. J. Collins
M. E. Cooksey
W. Cooper
P. H. Cox
B. D. Coy
R. Cummins
E. F. Deppeler
C. L. Devine
N. Dintelman
S. L. Dismang
J. L. Elledge
R. N. Embree
R. Etherton
W. E. Fisher
A. Frankenreiter
N. L. Frost
J. D. Gage
K. Garrison
D. W. Gouge
J. C. Gouge
C. H. Green
C. H. Greer
W. G. Grider
E. R. Hanna
R. H. Hawk
K. L. Hendrix
G. T. Hicks
K. C. Hollandsworth
D. M. Hullen
G. D. Irwin
J. L. Italiano
D. Johnson
W. R. Jones
G. Kelly
E. Ker
T. M. Kinsey
B. W. Larose
P. L. Latimer
D. Lee
J. W. Long
C. B. Lovins
J. R. Maggard, Jr.
B. H. Manning
F. E. Marciniak
J. R. Martin
D. E. Masson
R. M. McClaury
N. J. McKee
H. D. Means
G. L. Melton
D. D. Miller
G. D. Moody
S. L. Moore
N. C. Parson
A. Petelin
O. O. Pfeifer
T. S. Pliler
R. S. Plunkett
J. D. Porter
S. Rader
P. A. Reeves
G. R. Robinson
D. R. Rose
L. W. Roth
C. C. Romlett
J. J. Sanders
K. Scanlon
D. G. Schmied
P. Schmouty
E. F. Sensmeyer
K. W. Sharp
R. W. Shelley
J. H. Sherman
D. E. Smith
F. E. Smith
M. A. Smoot
J. D. Stanley
J. L. Stoker
H. H. Stubbs
W. M. Tatum
E. N. Taylor
D. W. Thorne
J. W. Tipton
J. P. Trask
C. A. Turner
L. E. Tuter
W. V. Walton
J. H. Watts
J. W. White
P. Williams
R. C. Williams
B. G. Wolfe
J. T. Wormsley
J. M. Zeller